IN THE

Supreme Court of the United States

October Term, 1972

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 72-762

ALVAREZ REYES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

Alvarez Reyes seeks certiorari to review a judgment of the Court of Appeals of the State of New York, rendered September 28, 1972, which unanimously affirmed a judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, rendered March 16, 1972, which affirmed, by a divided court, a judg-

ment of the Supreme Court of the State of New York, New York County, rendered September 28, 1971, convicting him, after trial, of CRIMINALLY SELLING A DANGEROUS DRUG IN THE THIRD DEGREE (N.Y. Penal Law, §220.35). Reyes was sentenced to an indeterminate term of imprisonment not to exceed four years.

The Opinions Below

The judgment and memorandum of the New York Court of Appeals, from which petitioner seeks review by certiorari, appears at 30 N.Y. 2d 881, *remittitur amd.* 31 N.Y. 2d 668 (1972). The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, appears at 38 A.D. 2d 921 (1st Dept. 1972). The Supreme Court of the State of New York, New York County, convicted petitioner without opinion.

Jurisdiction

The petition for certiorari was filed on or about November 17, 1972. The petitioner invokes this Court's jurisdiction on certiorari pursuant to 28 U.S.C. §1257(3).

Statement of the Case

The Charges

The petitioner was arrested on June 25, 1970 and was subsequently indicted by a New York County Grand Jury and charged with six counts alleging the sale, possession with intent to sell, and possession of heroin on two separate occasions. Counts one, two, and three charged him with

the sale, possession with intent to sell, and possession of heroin on June 22, 1970. Counts four, five, and six charged him with committing these same crimes on June 25, 1970.

On May 24, 1971, the petitioner waived his right to a trial by jury. Immediately thereafter, he was tried by Mr. Justice CULKIN of the Supreme Court of the State of New York, New York County.

The Trial

The People's proof at trial was primarily the testimony of two police officers who operated as part of an undercover narcotics team in Harlem. The officers both stated that on two separate dates, June 22, 1970, and June 25, 1970, petitioner sold heroin on the street to one of the undercover officers. Petitioner put forth an alibi, claiming that he was never on this street at the time stated by the officers on either of the dates in question. His alibi as to the first date was totally unsupported and was made out solely by his own testimony. As to the second date, however, petitioner's nephew testified that he was playing pool with Reyes at the time.

At the conclusion of the trial, the court found the defendant guilty under the first count of the indictment, which charged him with selling heroin on June 22, 1970, but acquitted him on the other counts, holding that "As to the other counts of the indictment * * *, the Court feels that it should give the benefit of the doubt to the defendant, that the defendant has created a situation wherein the People have failed to prove that part of the case beyond a reasonable doubt." (Petition, p. 9.)

The Intermediate Appeal

On appeal to the Appellate Division, Reyes raised numerous issues under state law, contending that his conviction was against the weight of the evidence; that the trial judge improperly cast upon the defendant the burden of proving his alibi; that the trial judge improperly used evidence of the second sale to convict him as to the first; that the joinder of the two crimes in one indictment was prejudicial; that the judge's questioning of witnesses to resolve ambiguity was improper; and that his sentence was unduly severe and excessive. The Appellate Division found all of these contentions to be without merit and affirmed the judgment of conviction on March 16, 1972. In its opinion, at 38 A.D. 2d 921 (1st Dept. 1972), the court stressed the fact that the sole issue in the case was which set of witnesses was to be believed, and refused to substitute its judgment for that of the trial court on this question:

> "As stated by defendant's trial counsel, the sole question in this case is 'who is to be believed?' The general rule is that the credibility of witnesses is an issue of fact for the fact finder. There is no reason in this case for this court to substitute its judgment for that of the trial court."

Two Justices disagreed, stating: "Since the trial court • • • refused to credit the testimony of the undercover narcotics officer as to the alleged sale on June 25, 1970, it is difficult to see how, on the record here presented, the same witness' testimony could be believed as to the sale allegedly made to him by the appellant three days earlier (when no arrest was made)."

On March 21, 1972, one of the dissenting Appellate Division Justices granted Reyes permission to appeal to the New York Court of Appeals.

The Final Appeal

On appeal to the New York Court of Appeals, the petitioner renewed his attack upon the conduct of the trial judge, again alleging that he was not proven guilty beyond a reasonable doubt; that the trial judge improperly shifted to him the burden of proving his alibi; that the joinder of the two indictments was improper, and that the judge's questioning of witnesses was improper.

The New York Court of Appeals found these arguments to be without merit, and unanimously affirmed the judgment of the Appellate Division on July 6, 1972. 30 N.Y.2d 881 (1972). Subsequently, the petitioner moved for reargument and amendment of the remittitur. On September 28, 1971 the Court denied the motion for reargument but amended the remittitur to read as follows:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether the rights of the defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that the disparity of the disposition of the two charges against him by the trial court violated due process and that the trial court cast the burden of the defendant to prove his alibi. The Court of Appeals considered these contentions and held that there was no violation of defendant's constitutional rights." 31 N.Y.2d at 668.

ARGUMENT

The People were required to disprove Reyes's alibi beyond a reasonable doubt.

The petitioner contends that the trial court shifted to him the burden of proving his alibi defense, thus depriving him of his right to due process under the Fourteenth Amendment to the Constitution of the United States. For this proposition he relies solely upon the decision of the United States Court of Appeals in *Stump* v. *Bennett*, 398 F. 2d 111 (8th Cir. 1968), *cert. denied* 393 U.S. 1001 (1968). In that case, the Court struck down an Iowa statute which required a defendant asserting an alibi defense to prove that defense by a preponderance of the evidence, finding that this rule violated due process. However, New York law contains no comparable provision, and the People were required to disprove the petitioner's alibi defense beyond a reasonable doubt. Accordingly, *Stump* is totally inapplicable to the instant petition, and this case presents no substantial federal issue which would warrant the exercise of this Court's certiorari jurisdiction.

The standards of proof applicable to defenses raised in criminal cases in the State of New York are set forth in §25.00 of the New York Penal Law. That section provides that:

> "1. When a 'defense' other than an 'affirmative defense,' defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

Affirmative defenses in New York include such things as "duress" (N.Y. Penal Law §35.35) and "entrapment" (N.Y. Penal Law §35.40). However, the defense of alibi,* which is not technically a defense at all, but rather a direct refutation of the People's proof, is not enumerated as an "affirmative defense" under the New York Penal Law.

Accordingly, the People have the burden of disproving this defense beyond a reasonable doubt. "If the proof as to an alibi, when taken into consideration with all the other evidence, raises a reasonable doubt as to defendant's guilt, he is entitled to an acquittal." *People* v. *Elmore*, 277 N.Y. 397, 405 (1938); *accord*, *People* v. *Barbato*, 254 N.Y. 170, 178 (1930); *People* v. *Regina*, 19 N.Y. 2d 65, 72 (1966); *see also People* v. *Steele*, 26 N.Y. 2d 526, 529 (1970); *People* v. *Meehan*, 256 App. Div. 268, 269 (1st Dept. 1938).

Moreover, as the petitioner points out, the New York Court of Appeals has evinced an awareness of the rationale of *Stump* v. *Bennett*. In *People* v. *Laietta*, 30 N.Y. 2d 68, 75 (1972), *cert. denied* 407 U.S. 923 (1972), the Court considered the case and found that it had no bearing on the

* "The defense of alibi, which does not, in theory, deny that the crime charged was committed, is the defense that the accused was at another place than that at which the alleged crime was committed at the time it was committed, the literal meaning of alibi being 'elsewhere'." 22 C.J.S. Criminal Law §40. *See also Tomlinson* v. *United States*, 93 F. 2d 652, 655 (D.C. Cir. 1937), *cert. denied* 303 U.S. 646 (1937).

particular New York affirmative defense under consideration, impliedly rejecting its applicability in this state.

However, the petitioner nevertheless maintains that despite the applicable New York law, the trial judge did shift the burden of proof to the defendant. This claim was rejected by both New York Appellate Courts and is refuted on the very face of the trial court's verdict, which the petitioner himself quotes in his petition:

> "The Court: The court finds the defendant guilty of the crime of criminally selling a dangerous drug in the third degree, under the first count of the indictment. As to the other count of the indictment, * * * the court feels that it should give the benefit of the doubt to the defendant, that *the defendant has created a situation wherein the People have failed to prove that part of the case beyond a reasonable doubt.* And, therefore, the other counts of the indictment are dismissed" (petition, p. 9, emphasis supplied).

Further, this case presents nothing more than a simple conflict in testimony between two sets of opposing witnesses. Two police officers had testified that Reyes sold drugs to one of them on two separate occasions. Reyes simply stated that he had not done so and was not on the street in question at the times stated. The finder of fact chose to believe the officers. Thus, the issue was purely one of credibility, and both New York appellate courts properly refused to substitute their judgment for that of the fact finder on such an issue. "If the record in its entirety permits a fair conflict in the evidence, or if conflicting inferences can properly be drawn from it, the determination of the jury [as fact finder] will not be interfered with un-

less it is clearly against the weight of the evidence, or appears to have been influenced by passion, prejudice, mistake, or corruption." *People* v. *Horton*, 308 N.Y. 1 (1954); *accord, People* v. *Farrell*, 2 A.D. 2d 797, 798 (3d Dept. 1956). The principle that credibility is an issue for the fact finder has also been repeatedly recognized in federal jurisprudence. *Turner* v. *United States*, 426 F. 2d 480, 482 (6th Cir. 1970), *cert. denied* 402 U.S. 982 (1970); *San Nicholas* v. *Government of Guam*, 325 F. 2d 781, 783 (9th Cir. 1963); *Land* v. *United States*, 148 F. 2d 816, 817 (5th Cir. 1945), *cert. denied* 326 U.S. 70 (1945); *Zammos* v. *United States*, 217 F. 2d 223, 225 (8th Cir. 1954).

Moreover, in *Smith* v. *Smith*, 454 F.2d 572, 578 (5th Cir. 1972), *U.S. appeal pending*, a case which appellant fails to cite, the Court applied *Stump* to overturn a Georgia alibi instruction similar to Iowa's, holding that "evidence of alibi should come into a case like any other evidence and must be submitted to the jury for consideration of whether the evidence as a whole on the issue of presence proves defendants guilt beyond a reasonable doubt." This is exactly what is done in New York, and what was done in this case. Accordingly, this case presents nothing more than a question of whose testimony is to be credited, and an issue of this nature provides no basis for the exercise of certiorari jurisdiction.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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